Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	))))	CC Docket No. 02-39
	)	

COMMENTS OF TIME WARNER CABLE

Steven N. Teplitz
Susan A. Mort
TIME WARNER INC.
800 Connecticut Ave., N.W., Suite 800
Washington, DC 20006

Marc J. Lawrence-Apfelbaum
Julie Patterson Laine
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902

May 29, 2007

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)))))))	CC Docket No. 02-39

COMMENTS OF TIME WARNER CABLE

Time Warner Cable submits these comments in response to the Commission's Public Notice seeking to refresh the record in the above-captioned docket.[1] In 2002, the Commission initiated a review of the equal access and nondiscrimination obligations of Section 251(g) of the Communications Act of 1934, as amended.[2] In the Public Notice, the Commission noted that "the structure of the industry has changed considerably since comments were filed in response to the NOI in 2002" — citing two fundamental changes. First, "the market appears to be shifting from competition between stand-alone long distance services to competition between service bundles including both local exchange and long distance services."[3] Second, the "industry structure has also changed with the mergers of local and long distance providers."[4]

---

1 *Parties Asked to Refresh Record Regarding Review of Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, Public Notice, DA 07-1071 (rel. Mar. 7, 2007) ("*Public Notice*").

2 *See Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, 17 FCC Rcd 4015 (2002) ("*NOI*").

3 *Public Notice*, at 1.

4 *Id. See AT&T Inc. and BellSouth Corporation,* Application for Transfer of Control, Memorandum Opinion and Order, WC Docket No. 06-74, FCC 06-189 (rel. March 26, 2007) ("*AT&T-BellSouth Merger Order*"); *SBC Communications Inc. and AT&T Corp., Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, FCC 05-183 (rel. Nov. 17, 2005) ("*SBC-AT&T Merger Order*"); *Verizon*

INTRODUCTION AND SUMMARY

As a competitive provider of bundled local and long distance telephone services, Time Warner Cable has participated directly in the changes described in the Public Notice, which have rendered equal access requirements obsolete. Consumers now can purchase bundled services from facilities-based providers over wireline, wireless, and cable platforms, and these choices are supplemented by over-the-top VoIP services and resale offerings that do not depend on the local exchange carrier for access to the consumer. To the extent that stand-alone long-distance providers remain viable, market forces are adequate to preserve consumer choice, and Section 202 remains as a backstop to prevent unreasonable discrimination. While Time Warner Cable believes that it is not subject to equal access obligations, it nevertheless supports elimination of such requirements based on its consistent view that regulation should be scaled back where a competitive environment exists.

If the Commission does not take prompt action to eliminate the existing equal access requirements, it should confirm that such obligations apply only to incumbent LECs. The *NOI* left unclear whether competitive providers are subject to any equal access obligations, creating regulatory uncertainty. The Commission's orders imposing equal access obligations are best read as applying only to incumbent carriers, as was noted in a recent Recommended Decision by the Federal-State Joint Board on Universal Service.[5]

Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-75, FCC 05-184 (rel. Nov. 17, 2005) ("*Verizon-MCI Merger Order*").

[5] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service,* Recommended Decision, WC Docket No. 05-337, CC Docket No. 96-45, FCC 07J-1, at 4 (rel. May 1, 2007) ("*Joint Board Recommended Decision*") ("[C]ompetitive ETCs, unlike incumbent LECs, have no equal access obligations.").

At a minimum, if the Commission does nothing else in this docket, it should eliminate equal access obligations for competitive providers of bundled services, to the extent such obligations apply. Such obligations clearly serve no purpose in that context, where long distance service is included at no additional charge in a flat-rate offering, because consumers have no interest in paying more to receive a separate long distance service. Market forces will ensure that providers of bundled services are responsive to customers' needs, irrespective of any regulatory requirements.

BACKGROUND

Time Warner Cable is the nation's second largest cable operator and owns or manages cable systems passing more than 26 million homes and serving more than 14 million subscribers. In addition to its basic and digital cable services, Time Warner Cable offers broadband Internet access and a facilities-based VoIP service called Digital Phone. Digital Phone users can make unlimited calls anywhere in the United States, Canada and Puerto Rico, with the option to receive both local and long distance service for one low monthly price. As of March 31, 2007, Time Warner Cable served more than 2 million Digital Phone subscribers, and that total is growing rapidly.

DISCUSSION

I. EQUAL ACCESS REQUIREMENTS ARE OUTDATED AND SHOULD BE ELIMINATED.

The regulatory concerns that prompted adoption of the equal access requirements no longer apply in today's marketplace. Equal access requirements were originally intended as an antitrust remedy to curb the Bell operating companies' market power in the wake of the AT&T divestiture. The court that oversaw that breakup was concerned that, absent judicial intervention, the BOCs would favor AT&T over other IXCs.[6] The Commission subsequently recognized that the "features of equal access services that [had] been set forth in the MFJ" (and the GTE Consent Decree) were "equally valid in their application" to independent incumbent LECs.[7] The Commission later explained that "the primary purpose of section 251(g)," which codifies the equal access requirements imposed by the court and the Commission, "is to preserve the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled elements purchased from an incumbent."[8]

In recent years, however, the growth of facilities-based telephone competition — at least in the mass market — has eliminated the need for equal access mandates, particularly in light of the developments cited in the Public Notice.

First, the widespread availability of facilities-based bundled offerings from cable operators and wireless carriers ensures that consumers have a choice of service plans that include unlimited long distance. Indeed, bundled service plans have been so successful that stand-alone long distance, offered without a companion local service, may soon cease to exist. The Commission has recognized that consumers prefer the convenience and savings of bundled service packages and, as a result, that "long distance service purchased on a stand-alone basis is

---

6 *See NOI*, ¶¶ 3, 11; *United States v. American Tel. and Tel.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

7 *MTS and WATS Market Structure Phase III*, Report and Order, CC Docket No. 78-72, Phase III, 100 FCC 2d 860, ¶ 59 (1985) ("*MTS and WATS Order*").

8 *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, ¶ 362 (1996).

becoming a fringe market."[9] Universal service contribution data corroborate this strong trend: "[W]hile stand-alone interstate long distance revenues have been declining, wireless services and interconnected VoIP services, both of which typically include bundled long distance service, have been growing dramatically."[10] The decisions by AT&T and MCI to cease marketing long distance services further highlight the sea change in the industry.[11] In turn, the Commission has treated bundled local and long distance services as a separate product market in merger proceedings, focusing primarily on the growth of intermodal competition.[12] And to the extent that the Commission still treats long distance service as a separate product market, it has done so based on the circular rationale that equal access requirements require the option of a separate service.[13]

The purpose of equal access requirements was never to preserve long distance providers' access to LECs' networks as an end in itself. Rather, equal access was a means to develop a competitive market for long-distance services that would, in turn, further the Commission's overall mission of benefiting consumers through lower prices and higher service quality. Today, market forces drive competition for long distance services as part of bundles, rather than as stand-alone products. In addition to the bundles offered by facilities-based providers, consumers can choose from an array of over-the-top VoIP services and resale offerings. As a result of this

---

9 *AT&T-BellSouth Merger Order*, ¶ 97. *See also SBC-AT&T Merger Order*, ¶ 91; *Verizon-MCI Merger Order*, ¶ 92.

10 *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, WC Docket No. 06-122, 21 FCC Rcd 7518, ¶ 3 (2006).

11 *See AT&T-BellSouth Merger Order*, ¶ 97.

12 *Id.*, ¶ 102. *See also Verizon-MCI Merger Order*, ¶ 97.

13 *SBC-AT&T Merger Order*, ¶ 92. *See also AT&T-BellSouth Merger Order*, ¶ 97; *Verizon-MCI Merger Order*, ¶ 97.

unprecedented choice, long distance rates are lower than ever before.[14] The Commission's regulations should reflect the competitive dynamics of the present rather than those of decades past.

Second, the mergers of MCI with Verizon, and of AT&T with SBC and BellSouth, obviate concerns about those leading long distance providers' ability to obtain exchange access services on reasonable terms. As free-standing entities, MCI and AT&T relied on equal access requirements to be assured of an opportunity to compete for long distance revenues. Now that they have become vertically integrated with the nation's largest local service providers (and have ceased marketing stand-alone long distance service), however, that question of access is moot. Moreover, the combination of the largest long distance providers and largest local carriers — while posing some concerns in other contexts, such as the enterprise market — has created new opportunities for other long distance carriers. Specifically, the emergence of bundled offers from entities that *lack* their own nationwide long distance networks — including Time Warner Cable and other cable operators, and several major wireless carriers — has facilitated transactions such as Sprint's pairing with cable operators to provide long distance service to their local telephone customers.[15] Other long distance carriers have similar opportunities to partner with competitive voice providers in creating more compelling service offerings.

Third, the explosive growth of all-distance wireless services in the absence of any equal access mandate demonstrates that consumers will benefit from a deregulatory environment.

---

14 *See, e.g.*, *Trends in Telephone Service*, Industry Analysis and Technology Division Wireline Competition Bureau, Table 3.2 (February 2007) (noting that average monthly household expenditures on stand-alone long distance were $8 in 2005, compared to $21 in 1995).

15 *See, e.g.*, Olga Kharif, *Sprint Nextel's Watershed Deal*, BusinessWeek (Nov. 3, 2005) (discussing Sprint's deal joint venture with Comcast, Cox Communications, Time Warner Cable, and Advance/Newhouse Communications).

Congress specifically exempted wireless carriers from equal access obligations,[16] providing a test case for how competition and consumers fare in the absence of such requirements. Notwithstanding (or, indeed, because of) such deregulation, the wireless sector generally has been robustly competitive.[17] In particular, consumers have increasingly used bundled wireless plans to make long distance calls. For example, analyst reports indicate that "customers in nearly a third of American households make at least half their long-distance calls at home from their cell phones rather than from their landlines," and "an additional 42 percent of cellphone users said that they also had a landline phone, but that they used their cellphones 'most.'"[18] Plainly, the absence of equal access requirements has not inhibited the growth of long distance competition over the wireless platform. Indeed, in light of the robust competition, if consumers customers *did* want to purchase long distance service separately, any wireless provider could gain an advantage by offering equal access, irrespective of any regulatory requirement. But none has done so.

The success of the wireless experiment not only shows the absence of consumer harm, but also argues for eliminating equal access obligations more broadly from the standpoint of competitive neutrality. While wireless services often complement wireline and cable-based bundles, they also compete head-to-head. The Commission has cited surveys indicating that, as

---

[16] 47 U.S.C. § 332(c)(8).

[17] *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Eleventh Report, WT Docket No. 06-17, 21 FCC Rcd 10947, ¶¶ 2-3 (2006) (noting that 98 percent of the U.S. population lives in counties with access to three or more wireless carriers, and "competitive pressure continues to drive carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers").

[18] *Id.*, ¶ 206 (citations omitted).

of 2006, as many as 12 percent of mobile phone users do not purchase any wireline service.[19] Such intermodal competition is likely to increase with the continuing allocation of additional broadband spectrum. In such a marketplace, it makes no sense for one set of providers to be free from regulations borne by others, unless a provider's market power requires such differentials. As explained above, however, competition among providers of bundled services has progressed to the point that equal access obligations are not necessary to protect competition or consumers.[20] The differential imposition of equal access requirements imposes needless costs and burdens on selected competitors, and accordingly should be remedied through the prompt elimination of such obligations.

If the Commission chooses to eliminate existing equal access requirements, either by rulemaking or through forbearance, it can backstop its reliance on market forces by relying on Section 202(a) of the Act to curb any unreasonably discriminatory practices.[21] That general prohibition against unreasonable discrimination will be more than adequate in a competitive marketplace to deter any abusive practices.[22]

II. IF THE COMMISSION DOES NOT ELIMINATE EQUAL ACCESS REQUIREMENTS, IT SHOULD DECLARE THAT THEY DO NOT APPLY TO COMPETITIVE VOICE PROVIDERS.

In addition to the broad policy issues raised in the NOI, the Commission sought comment on the legal question whether equal access requirements apply at all to competitive carriers.[23]

---

19 *Id.*, ¶ 205.

20 In any event, as discussed further below, there can be no legitimate argument for imposing equal access on cable telephony providers like Time Warner Cable, which plainly lacks market power.

21 47 U.S.C. § 202(a).

22 *See, e.g.*, Reply Comments of Verizon, CC Docket No. 02-39, at 4-5 (June 10, 2002).

23 *See NOI*, ¶ 20.

Time Warner Cable submits that the Commission never extended such obligations to competitive LECs or interconnected VoIP providers, and Section 251(g) therefore does not apply to such entities.

The history of equal access requirements clearly indicates that they were intended to apply only to incumbents. The MFJ originally required the BOCs to "provide to all interexchange carriers and information service providers exchange access, information access and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates."[24] As noted above, the Commission extended such requirements to independent incumbent LECs in 1985.[25] Because competitive LECs (and, obviously, VoIP providers) did not exist at that time, they could not have been included within the scope of that mandate. The 1996 Act preserved only those requirements that already existed; more specifically, Section 251(g) maintained the "equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996."[26] The Joint Board on Universal Service recently confirmed its understanding that competitive providers, "unlike incumbent LECs, have no equal access obligations."[27] Therefore, if the Commission declines to eliminate the equal obligations, it should clarify that, as a matter of law, such obligations apply only to incumbent LECs.

---

[24] MFJ § II(A), in *United States v. AT&T Tel. & Tel. Co.*, 552 F. Supp. 131, 227 (D.D.C. 1982).

[25] *MTS and WATS Order*, ¶ 59.

[26] 47 U.S.C. § 251(g).

[27] *Joint Board Recommended Decision* at 4.

III. AT A BARE MINIMUM, THE COMMISSION SHOULD EXEMPT COMPETITIVE PROVIDERS OF BUNDLED SERVICES FROM EQUAL ACCESS REQUIREMENTS.

If the Commission does nothing else in this docket, it at least should take action to exempt competitive providers of bundled services from equal access obligations. Equal access requirements do not serve any purpose when applied to flat-rated bundled service plans, because the consumer already has access to long distance calling at no additional charge. There is no reason to believe that consumers would be interested in paying extra to receive long distance service from a separate provider. That fact, together with competitive providers' lack of market power, removes any conceivable justification for applying equal access obligations to competitive providers of bundled services.

The consumer benefits associated with bundling further confirm that equal access mandates are unnecessary. As noted above, bundling on wireless platforms has resulted in reduced prices and increased innovation, and the same is true for cable telephony providers like Time Warner Cable. Time Warner Cable's Digital Phone service has delivered low prices, high quality, and innovative features, as demonstrated by its rapid acceptance by more than two million customers.[28]

---

[28] Cable telephony offerings have saved money not only for their own subscribers, but for subscribers of incumbent LECs' services, as ILECs have cut prices in the face of competition. For example, Verizon's flat-rate, unlimited Freedom plan, including unlimited local, regional and domestic long-distance calling with voice mail, call waiting and caller ID, debuted in Wisconsin in mid-2004 at $64.95 per month. *See, e.g.*, Verizon Press Release (July 20, 2004), available at <http://newscenter.verizon.com/press-releases/verizon/2004/page.jsp?itemID=29711840>. By July 2006, that plan cost $44.99 per month. *See* Press Release, (rel. July 11, 2006) available at <http://newscenter.verizon.com/press-releases/verizon/2006/page.jsp?itemID=29669736>. More recently, Verizon has made the same plan available in certain East Coast markets at $34.95 to $39.95. *See* Verizon Press Release (Nov. 8, 2005) available at <http://newscenter.verizon.com/press-releases/verizon/2005/page.jsp?itemID=29707069>.

As competitors strive to gain market share, they have every incentive to offer consumers choice and flexibility, irrespective of what regulations may require. For example, to the extent that a business customer seeks the option to purchase long distance service from a separate provider, Time Warner Cable has the incentive to meet that demand, rather than risking losing the customer altogether. In the mass market, Time Warner Cable will likewise remain sensitive to its customers' preferences and will tailor its offerings accordingly. While Time Warner Cable believes that equal access requirements are no longer necessary for any purpose, it should be beyond dispute that they provide no benefits as applied to competitive providers of bundled services.

CONCLUSION

For the foregoing reasons, the Commission should eliminate the equal access and nondiscrimination obligations of Section 251(g). Alternatively, the Commission should clarify that such requirements apply only to incumbent LECs, or at a minimum exempt competitive providers of bundled services from any requirements that may apply.

Respectfully submitted,

/s/ Julie Patterson Laine

Marc J. Lawrence-Apfelbaum
Julie Patterson Laine
TIME WARNER CABLE
290 Harbor Drive
Stamford, CT 06902

Steven N. Teplitz
Susan A. Mort
TIME WARNER INC.
800 Connecticut Ave., N.W., Suite 800
Washington, DC 20006

May 29, 2007